Louisiana Law Review

Volume 24 | Number 2
The Work of the Louisiana Appelate Courts for the 1962-1963 Term: A Symposium
February 1964

Workmen's Compensation - Credit Against Liability For Wage Payments To Retained Employees

Kenneth D. McCoy Jr.

owner who is deprived of receiving a fair share of the waters beneath his land. To this end it is submitted that some sort of legislative scheme should be enacted which would specifically empower the commissioner of conservation to make the requisite findings, orders, and regulations necessary for equitable solution of water shortage problems whenever they arise and — what is more important — for the administration of these resources in such a manner as to eliminate the possibility of their occurrence.

Wendell G. Lindsay, Jr.

WORKMEN'S COMPENSATION — CREDIT AGAINST LIABILITY FOR WAGE PAYMENTS TO RETAINED EMPLOYEES[1]

If following convalescence for an industrial accident an injured employee is rehired by his former employer and thereafter seeks workmen's compensation payments, questions inevitably

water levels in wells 200, 500, and 700 feet deep were a few feet above the land surface in 1905, whereas at present (1955) the levels are as much as 50 feet below the surface in wells screened in the "200-foot" sand, 85 feet below the surface in wells screened in the "500-foot" sand, and as much as 70 feet below the surface in wells screened in the "700-foot" sand. This is the result of an average daily pumpage of about 60 million gallons a day for all purposes for the past decade."

"In southwestern Louisiana, where the average daily pumpage amounts to about 530 million gallons, or about 1,600 acre-feet, there has been an average annual decline of about 1.2 feet per year for the past ten years. Owing to local concentration of pumping and poor well spacing there have been a number of local problems, such as decreasing yield from wells and excessive lowering of water levels. However, there has been no excessive regional lowering, and none is anticipated at the present rate of pumping. It is estimated that an average of only about 10 acre-feet of ground water is being removed daily from storage. This amounts to less than 1 percent of the annual average of 596,000 acre-feet of ground water being pumped for all purposes in southwestern Louisiana. In other words, more than 99 percent of the water pumped is replenished by recharge.

"Owing to increased pumping at Monroe and vicinity, there has been a continuous water-level decline in wells screened in the principal sands, which range in depth from 450 to 950 feet. Since 1946, the average rate of decline has been 4 feet per year. At present (1954) the water level is about 120 feet in wells near the periphery of the area of heavy withdrawal, and about 220 feet in the area of heavy withdrawal." LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER — A SPECIAL REPORT TO THE LOUISIANA LEGISLATURE 27 (1956). See DEPARTMENT OF CONSERVATION, LOUISIANA GEOLOGICAL SURVEY, and LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER RESOURCES PAMPHLETS 1-10 (1954-61) and WATER RESOURCES BULLETINS 1-2 (1960-61); LOUISIANA DEPARTMENT OF PUBLIC WORKS, WATER — A SPECIAL REPORT TO THE LOUISIANA LEGISLATURE (1956); LOUISIANA LEGISLATIVE COUNCIL, WATER PROBLEMS IN THE SOUTHEASTERN STATES (1957). See generally COUNCIL OF STATE GOVERNMENTS, STATE ADMINISTRATION OF WATER RESOURCES (1957); Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1 (1959).

1. The term "retained employee" is used to refer to an employee who has re-

arise whether the employer should be permitted to credit any portion of the wages paid subsequent to the injury against his compensation responsibilities.[2] The initial solution, adopted in *Hulo v. City of New Iberia*,[3] required allocation of these wages into earned and unearned portions; the employer was then given credit for the unearned portion. Probably because of administrative difficulties encountered in apportioning the wage, the court altered its course in *Carlino v. United States Fid. & Guar. Co.*[4] and allowed a flat deduction of one week's compensation liability for each week wage payments equalled or exceeded the maximum compensation due. In applying the *Carlino* rule, subsequent cases have made no distinction between earned and unearned wages.[5]

In *Mottet v. Libbey-Owens-Ford Glass Co.*[6] the Supreme Court again shifted its approach. The employer claimed credit

ceived a compensable injury, and thereafter has returned to work with the same employer without regard to whether he retains the same job or receives the same wage. Prematurity and prescription, though closely related to compensation credit, are beyond the scope of this Note.

Several well-established principles in this area are not questioned in this Note: the employer is not entitled to claim credit for wages paid to the employee by another employer, Pohl v. American Bridge Division United States Steel Corp., 109 So. 2d 823 (La. App. Orl. Cir. 1959); Guillory v. Coal Operators Cas. Co., 95 So. 2d 201 (La. App. 1st Cir. 1957); employee income from special funds are not to be credited to the employer, Rimbolt v. City of New Orleans, 150 So. 2d 871 (La. App. 4th Cir. 1963) (50 percent of salary continued as retirement pension); Walters v. General Acc. & Fire Assur. Corp., 119 So. 2d 550 (La. App. 1st Cir. 1960) (statute required payment of salary to injured fireman for one year following injury); France v. City of New Orleans, 92 So. 2d 473 (La. App. Orl. Cir. 1957) (sick leave commensurate with tenure of employment); Rhodus v. American Employers Ins. Co., 9 So. 2d 821 (La. App. 1st Cir. 1942); credit is never allowed against liability for schedule injuries under LA. R.S. 23:1221(4) (1950); Fruge v. Hub City Iron Works, Inc., 131 So. 2d 593 (La. App. 3d Cir. 1961); and credit is not allowed for casual gifts to the employee, Haskett v. City of Shreveport, 17 So. 2d 385 (La. App. 2d Cir. 1944).

2. See generally MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 401 (1951); 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.40 (1952).

3. 153 La. 284, 95 So. 719 (1923).

4. 196 La. 400, 199 So. 228 (1940). Though *Carlino* involved an insurer, the same credit rule was soon extended to employers. Annen v. Standard Oil Co. of New Jersey, 28 So. 2d 46 (La. App. 1st Cir. 1946).

5. *E.g.*, Daigle v. Higgins Indus., Inc., 29 So. 2d 374 (La. App. Orl. Cir. 1947) (op. on reh'g). The original opinion, 28 So. 2d 381, had refused to allow credit on the ground that the employee had actually earned the wage received by him. On rehearing the court cast this aside: "[W]e cannot say . . . that the Supreme Court has indicated . . . there is a distinction between the payment of earned wages and a gratuitous payment of unearned wages . . . ." 29 So. 2d at 377. "[W]e take the view that if, during that period for which compensation is due, the injured workman can earn a substantial living by working for the same employer at wages approximating those earned before the accident, the weeks for which he should earn such wages should be deducted from the 400 weeks during which compensation might otherwise be due to him." *Id.* at 379.

6. 220 La. 653, 57 So. 2d 218 (1952).

for wages paid an injured glass cutter rehired as a night watchman. The court refused credit, stating that the wages "were earned in a *different kind of work* . . . and cannot be considered in the nature of compensation or given credit on the award of compensation to the plaintiff."[7] (Emphasis added.) Subsequent decisions turned on whether the employee performed the "same work" after injury.[8]

Several courts of appeal decisions, however, indicated a lack of total satisfaction with the *Mottet* rule. Even though the retained employee was clearly in a different type of work, the court in one case also emphasized that he had fully earned the wage in reaching the conclusion that it could not be considered in lieu of compensation.[9] In another case credit was refused where the employee was performing the lighter part of his former duties at a reduced salary on the ground that the employee had earned the reduced wage.[10]

Recently in *Lindsey v. Continental Cas. Co.*,[11] the Supreme Court had occasion to pass on the continued vitality of *Mottet's* "change in employment" rule. An employee lost the sight of one eye while performing work as a mechanic, and upon return to work he received a pay boost and a promotion to shop foreman.

7. *Id.* at 660, 57 So. 2d at 220. The *Mottet* decision was soon followed in Myers v. Jahncke Service, Inc., 76 So. 2d 436 (La. App. Orl. Cir. 1954), in which the employee had been a shipfitter prior to the injury and now could work only as a subforeman. The court stated that the employer would have been allowed credit under the authority of Daigle v. Higgins Indus., Inc., 29 So. 2d 374 (La. App. Orl. Cir. 1947) but for the subsequent decision in the *Mottet* case. Later this same court clarified and affirmed the *Mottet* rule in the case of Beloney v. General Electric Supply Co., 103 So. 2d 491 (La. App. Orl. Cir. 1958), in which an employer was allowed credit on the ground that the post-injury work done by the employee was the identical work that he performed prior to the injury.

Following the *Mottet* case a few appellate decisions, *e.g.*, Smith v. Houston Fire & Cas. Ins. Co., 116 So. 2d 730 (La. App. 2d Cir. 1959); Moore v. Travelers Ins. Co., 79 So. 2d 507 (La. App. 2d Cir. 1955), continued to apply the *Daigle* rule, but for the most part the same-work distinction became established.

8. *Compare* Pohl v. American Bridge Division United States Steel Corp., 109 So. 2d 823 (La. App. Orl. Cir. 1959) *with* Walters v. General Acc. & Fire Assur. Corp., 119 So. 2d 550 (La. App. 1st Cir. 1960). In *Pohl* the court proclaimed that a "grounded" structural steel worker was still performing substantially the same work; and in *Walters* the court found that a fireman unable to fight fires and relegated to cleaning up the station house was performing duties of the same character as those of the full-fledged fireman.

9. White v. Calcasieu Paper Co., 96 So. 2d 621 (La. App. 1st Cir. 1957).

10. Woodson v. Southern Farm Bureau Cas. Ins. Co., 121 So. 2d 571 (La. App. 2d Cir. 1960). Here the court indicated that it would have allowed credit if the employee had been performing the same work as he had done prior to the injury even if he had to work under pain and suffering. This would follow under the *Mottet* rule, unless the pain so altered the performance of the work that the court could say the employee was in fact engaged in different work.

11. 242 La. 694, 138 So. 2d 543 (1962).

Both lower courts[12] disallowed credit on the authority of the *Mottet* rule, finding a "substantial change in the plaintiff's employment."[13] The Supreme Court affirmed the result, but firmly placed credit on a new base:

> "The basic test supported by the jurisprudence of this state is *whether the wages paid subsequent to the injury are actually earned.* If they are not earned, they are presumed to be in lieu of compensation. This was the essence of our holding in *Mottet v. Libbey-Owens-Ford Glass Co.*"[14] (Emphasis added.)

The *Lindsey* interpretation of *Mottet* was reaffirmed in *Madison v. American Sugar Refining Co.*[15] in which the Supreme Court elaborated further: "the fact that the services performed after the injury are similar, or dissimilar, to the services performed before may be relevant to the question of whether the wages are actually earned, but it is not decisive of it."[16]

Public policy seems to favor retention of injured employees. Workmen's compensation only partially ameliorates the plight of a person maimed by industry who can no longer compete effectively at his former craft; on the other hand, retention at substantially the same wage more nearly alleviates his distress. Allowing credit for post-accident wages is an effective way to foster retention; the possibility of double payment — wages and compensation for the same period — encourages the employer to eliminate the wage.[17]

12. 130 So. 2d 470 (La. App. 2d Cir. 1961). The court of appeal adopted the district court opinion as its own.

13. *Id.* at 474.

14. 242 La. at 701, 138 So. 2d at 545.

15. 243 La. 408, 144 So. 2d 377 (1962), *reversing* 134 So. 2d 646 (1961). The lower court had disallowed credit on the authority of the *Mottet* doctrine. Following that decision, the Supreme Court decided the *Lindsey* case, and subsequently granted writs and reversed the lower court.

16. *Id.* at 415-16, 144 So. 2d at 380.

17. See generally MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 401 (1951); Comment, 8 LA. L. REV. 397 (1948).

It is likely that an employee will not be able to work at full capacity when he first returns to work after injury. Thus, the employer is possibly tempted to turn to a full-bodied employee to do the work in place of the retained employee, if the employer is aware that he may be held for both wages and compensation. This will have the greatest impact on self-insurers, as they will immediately feel the financial impact of double payments, but even in the case of the insured employer, there is eventual reflection in the form of higher insurance premiums.

A contrary argument might be made taking the position that the employer has a given labor requirement which necessitates hiring someone. If the injured employee is capable of doing acceptable work in this particular position, it should not matter to the employer that he may also be liable for compensation to the same man. His total outlay would theoretically be the same whether he paid

The pre-*Mottet* cases which allowed credit without regard to whether the wage was earned or unearned would seem to encourage retention of the injured employee on the payroll.[18] Under *Mottet* the inherent uncertainty of determining whether an employee was performing his former duties or engaging in a different job would discourage retention.[19] Though *Lindsey* does eliminate the groundless distinction in the *Mottet* rule, it also largely destroys the desire to retain an injured employee, since the employer can no longer receive credit if the worker can be said to be earning his wage.

At first blush it might be argued that *Lindsey* favors the employer since it implies he would be allowed credit whenever the injured employee was not giving a dollar's worth of labor for every dollar of his pay.[20] If an employee performed only part of his former duties with no wage reduction it would seem to follow that a portion of his wage would be unearned and subject to credit. However, a partially earned wage may well be treated in the same manner as the fully earned wage.[21] The compensation statute and its surrounding jurisprudence have always been liberally interpreted in favor of the employee. Courts may attempt to avoid the administrative difficulty of allocating earned and unearned portions by liberally determining what has been earned or by simply ignoring the distinction.[22] This may effectively prevent credit for wages which in reality are only partially earned.

---

both compensation and wages to the same man, or paid only his compensation liability to the former employee, and hired a new man to perform the work. However, it is believed that this approach overlooks that employers frequently create new positions for injured employees or otherwise retain them when they would not necessarily hire someone new.

18. See cases listed in MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 402, at 516, n. 6 (1951).

19. The only time the employer could be certain he would not be held for both wage and compensation is when the employee could return in the *identical* position. Beloney v. General Electric Supply Co., 103 So. 2d 491 (La. App. Orl. Cir. 1958).

20. An earlier contrary holding was reconciled on the ground that the wage there was not fully earned. Pohl v. American Bridge Division United States Steel Corp., 109 So. 2d 823 (La. App. Orl. Cir. 1959). See note 8 *supra*.

21. *But see* Howard v. Globe Indem. Co., 147 So. 2d 912 (La. App. 1st Cir. 1962), *cert. denied*. Here the plaintiff was admittedly performing only part of his former duties, and the court remanded the case to determine whether the wage had been reduced or whether he was still receiving substantially the same wage. The court clearly indicated that they would allow credit on the authority of the *Woodson* rule if the plaintiff was receiving his old wages. See note 10 *supra*. The authority of *Howard* is uncertain, because the court failed to mention the *Lindsey* case.

22. Though many courts have cited the *Hulo* case, no other cases were found which attempted the difficult apportionment formula laid down in that case. See note 3 *supra* and accompanying text.

Presumably, *Lindsey* will have no effect on the employer's right to credit voluntary compensation payments which, if expressly made as compensation, are chargeable against liability regardless of whether any accompanying wage is earned or unearned.[23]

The traditional liberal interpretation of the Louisiana Workmen's Compensation Act has led to many judicial enlargements of its benefits.[24] *Lindsey* is unique in offering an enlargement which in a sense avoids the restrictive effect of the ceiling on weekly benefits, by allowing the employee to retain the benefit of wages paid during the same period that he is entitled to receive compensation payments.

Kenneth D. McCoy, Jr.

23. LA. R.S. 23:1206 (1950); White v. Calcasieu Paper Co., 96 So. 2d 621 (La. App. 1st Cir. 1957); France v. City of New Orleans, 92 So. 2d 473 (La. App. Orl. Cir. 1957).

This gives the employer a possibility of retaining the employee on the payroll, and yet avoiding liability for both wages and compensation. The employer should be able to enter an agreement with the injured employee to pay voluntarily the maximum allowable compensation, with the further stipulation that the employee would receive some additional small amount if he is willing to come to work (or stay at work). In such case, the employee is receiving more than the amount to which he is legally entitled under the compensation statute, and the employer gets the benefits of avoiding double payment and retaining an experienced employee at small expense over the compensation payments which he would have to make anyway. Possibly many employees would prefer this to forced idleness.

24. *E.g.*, adoption of assumed forty-eight hour work week. Rylander v. T. Smith & Son, Inc., 177 La. 716, 149 So. 434 (1933).